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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 FEDERAL TRADE COMMISSION,

12 Plaintiff,

13 vs.

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15 NEOVI, INC., et al.,

16 Defendants.

CASE NO. 06-CV-1952 JLS (JMA)

**ORDER: (1) RESERVING RULING
ON MOTION TO EXCLUDE
TESTIMONY OF DAN M.
FISHER; (2) GRANTING MOTION
TO EXCLUDE THIRD-PARTY
WEBSITES**

(Doc. Nos. 208, 209)

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18 Presently before the Court are Plaintiff Federal Trade Commission's motions to (1) exclude
19 testimony of Dan M. Fisher (Doc. No. 208); and (2) exclude third-party websites (Doc. No. 209).
20 Also before the Court are Defendants'¹ oppositions and Plaintiff's replies. (Doc. Nos. 212 (Opp'n to
21 Website Mot.), 213 (Opp'n to Fisher Mot.), 216 (Website Reply), 217 (Fisher Reply).) Having
22 considered the parties' arguments and the law, the Court rules as follows.

23 **BACKGROUND**

24 The parties are well aware of the background of this matter, and the Court and the Ninth
25 Circuit both have provided full descriptions of the underlying facts. (*See* Doc. No. 105 (MSJ Order),
26 at 2–8; *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1153–55 (9th Cir. 2010).) Those factual summaries are

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28 ¹ For clarity's sake, Defendants in this contempt proceeding are Thomas Villwock, James M. Danforth, G7 Productivity Systems, iProlog Corporation, and FreeQuick Wire Corporation. (Doc. No. 170.) The Court refers to them, collectively, as Defendants.

1 incorporated by reference here.

2 The motions before the Court pertain to a contempt hearing presently scheduled for April 27
3 and 28, 2011. In brief, after finding that Neovi, Inc.'s Qchex system violated section 5 of the FTC
4 Act, 15 U.S.C. § 45(n), the Court enjoined Neovi, G7 Productivity Systems, Inc., James M. Danforth,
5 Thomas Villwock, and others (collectively, Neovi) from "creating or delivering any check for a
6 customer" without performing identity verification of prospective customers and account control
7 verification. (Doc. No. 118 (Final Order), at 4–5.) While Neovi's appeal was pending before the
8 Ninth Circuit, Plaintiff moved for an order to show cause why Defendants should not be held in
9 contempt. (Doc. No. 156.) The Court granted Plaintiff's motion, but ultimately stayed the contempt
10 proceeding pending the outcome of Neovi's appeal. (Doc. Nos. 170, 177.) Plaintiff now argues that
11 Defendants' continuing operation of FreeQuickWire.com and sale of VersaCheck 2010® software and
12 Qchex check creation templates violate the Final Order. (Doc. Nos. 156, 182, 220.)

13 **MOTION TO EXCLUDE TESTIMONY OF DAN M. FISHER**

14 First, Plaintiff moves to exclude the testimony of Defendants' expert, Mr. Fisher, under
15 Federal Rule of Evidence 702. (*See* Doc. No. 208-1 (Mem. ISO Fisher Mot.).) Mr. Fisher's expert
16 report identifies four opinions that he intends to offer at the contempt hearing: (1) VersaCheck is a
17 check printing software solution, not a payment system; (2) VersaCheck is materially different than
18 Qchex; (3) VersaCheck provides benefits to small businesses and the consumer; and (4) applying the
19 Final Order to VersaCheck would have a significantly adverse impact on the industry. (*See* Doc. No.
20 208-2 (Fisher Report).) Plaintiff contends that Mr. Fisher's opinions are irrelevant, that Mr. Fisher
21 is not qualified to offer his opinions, and that Mr. Fisher's opinions are neither the products of reliable
22 principles and methods nor supported by sufficient facts and data. (*Id.* at 4–19.)

23 "If expert testimony will 'assist the trier of fact to understand the evidence or to determine a
24 fact in issue,' such testimony is admissible so long as '(1) the testimony is based upon sufficient facts
25 or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has
26 applied the principles and methods reliably to the facts of the case.'" *United States v. Redlightning*,
27 624 F.3d 1090, 1111 (9th Cir. 2010) (quoting Fed. R. Evid. 702). The trial judge acts as a gatekeeper
28 to ensure that the expert's proffered testimony is both reliable and relevant. *See United States v.*

1 *Freeman*, 498 F.3d 893, 901 (9th Cir. 2007). Ultimately, the decision to admit expert testimony rests
2 in the court's sound discretion. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (citing
3 *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 138–39 (1997)); *United States v. W.R. Grace*, 504 F.3d 745,
4 759 (9th Cir. 2007) (quoting *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002)).

5 The importance of the trial judge's gatekeeping role is limited where, as here, "the judge is the
6 trier of fact and has an ongoing opportunity to evaluate the admissibility and weight of expert
7 testimony." *Conlon Group Ariz., LLC v. CNL Biltmore Real Estate, Inc.*, 2009 WL 2259734, at *2
8 (D. Ariz. July 27, 2009); *accord Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir.
9 2004) ("The 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the
10 context of a bench trial."); *see also Laconner Assocs. Ltd. Liab. Co. v. Island Tug & Barge Co.*, 2008
11 WL 2077948, at *1 (W.D. Wash. May 15, 2008) (collecting cases). Thus, "[w]hile the court sitting
12 as trier of fact may not ignore the *Daubert* standards for assessing the reliability of testimony, it need
13 not make those determinations before hearing the testimony." *Wolkowitz v. Lerner*, 2008 WL
14 1885770, at *2 (C.D. Cal. Apr. 21, 2008); *see also FTC v. Connelly*, 2007 WL 6492913, at *2 n.2
15 (C.D. Cal. Aug. 10, 2007) ("Because this is a bench trial, the Court need not preclude the experts'
16 testimony because of potential problems with the sufficiency of facts or data relied on or the reliability
17 of the methods used to formulate their opinions. Rather, the Court can evaluate the experts' testimony
18 against the Rule 702 standard as they testify."); *Jones v. United States*, 127 F.3d 1154, 1156 (9th Cir.
19 1997) (noting that district court granted motion in limine to exclude plaintiffs' expert testimony after
20 a two-week bench trial).

21 Here, given the posture of the contempt proceeding, the Court concludes that the admissibility
22 of Mr. Fisher's expert testimony is best resolved after hearing it. The Court will allow Plaintiff an
23 opportunity to vigorously cross-examine Mr. Fisher and present contrary evidence before ruling on
24 the admissibility of Mr. Fisher's testimony. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-
25 examination[and] presentation of contrary evidence . . . are . . . traditional and appropriate means of
26 attacking shaky but admissible evidence."). Accordingly, the Court **RESERVES** ruling on the
27 admissibility of Mr. Fisher's testimony.

28 That said, the Court writes to express what it sees as Defendants' fundamental misconception

1 of the scope of the Final Order and the contempt hearing. First, relying on isolated statements in the
 2 Court's Order denying Defendants' motion to limit the scope of the show cause hearing, Defendants
 3 argue that "there can be no dispute that the Final Order only prohibits conduct that violates the [FTC]
 4 Act." (Opp'n to Fisher Mot. 7.) Defendants are wrong. It is well established that "[o]ne need not
 5 commit an unlawful act in order to be liable for" contempt—one only need disobey a court order.
 6 *NLRB v. Laborers' Int'l Union of N. Am.*, 882 F.2d 949, 954 (5th Cir. 1989) (citing *NLRB v. Deena*
 7 *Artware, Inc.*, 361 U.S. 398, 414 (1960)); *cf. Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320,
 8 1322 (9th Cir. 1997) ("[T]he issue here is not whether Zodiac infringed Wolfard's trademark. The
 9 issue is whether Zodiac violated a consent judgment. . . . [A] plaintiff in Wolfard's position . . . is not
 10 required to muster all of the evidence it would need to make out an original infringement case in order
 11 to prove contempt." (citing *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th
 12 Cir. 1982)). Accordingly, the only issue in these proceedings is whether Defendants violated the Final
 13 Order. *Wolfard Glassblowing*, 118 F.3d at 1322. To meet its burden, Plaintiff only must establish that
 14 Defendants "created" or "delivered" checks without performing identity verification of prospective
 15 customers and account control verification. (See Doc. No. 118 (Final Order), at 4–5; *FTC v.*
 16 *Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) ("The moving party has the burden of showing
 17 by clear and convincing evidence that the contemnors violated a specific and definite order of the
 18 court." (quoting *Stone v. City & Cnty. of S.F.*, 968 F.2d 850, 856 n.9 (9th Cir. 1992)).) The contempt
 19 hearing is not an opportunity for Defendants to litigate whether their continuing operation of
 20 FreeQuickWire.com and sale of VersaCheck 2010® software and Qchex check creation templates
 21 violate section 5 of the FTC Act.

22 Second, Defendants are forewarned that the contempt hearing is neither the time nor the place
 23 to relitigate the validity of the Final Order. "It is well established . . . that 'a contempt proceeding
 24 does not open to reconsideration the legal or factual basis of the order alleged to have been
 25 disobeyed . . .'" (Doc. No. 195 (Order Denying Mot. to Limit Scope of OSC Hearing), at 3 n.5
 26 (quoting *United States v. Rylander*, 460 U.S. 752, 756 (1983)).) Plaintiffs had two opportunities to
 27 challenge the Final Order—one before this Court in the underlying litigation and another before the
 28 Ninth Circuit. Defendants surely have forfeited any further objection to the Final Order as framed.

1 **MOTION TO EXCLUDE EVIDENCE OF THIRD-PARTY WEBSITES**

2 Second, Plaintiff moves to preclude Defendants from introducing into evidence at the contempt
3 hearing “thousands of third-party webpages.” (Doc. No. 209-1 (Mem. ISO Website Mot.), at 1.)
4 Plaintiff contends that this evidence is inadmissible because it is irrelevant, more prejudicial than
5 probative, and unauthenticated hearsay. (*See id.* at 3–6.)

6 Evidence is relevant if it has “any tendency to make the existence of any fact that is of
7 consequence to the determination of the action more probable or less probable.” Fed. R. Evid. 401.
8 Irrelevant evidence is inadmissible. Fed. R. Evid. 402.

9 Defendants contend that the third party websites relate to “whether the Final Order is clear and
10 definite enough to encompass, and does in fact encompass G7’s sale of products that enjoy widespread
11 use and application.” (Opp’n to Website Mot. 3.) Whether the Final Order is both specific and
12 definite is an element of Plaintiff’s affirmative case for contempt. *See Gates v. Shinn*, 98 F.3d 463,
13 467–68 (9th Cir. 1996) (“Specificity in the terms of the consent decree is a predicate to a finding of
14 contempt.” (citing *Vertex Distrib.*, 689 F.2d at 889)). But the Court cannot conceive of how the
15 activities of third parties bear any relevance to the specificity and definiteness of the Final Order, a
16 document that speaks for itself. *See generally Ball v. Idaho State Bd. of Corr.*, 869 F.2d 461, 465 (9th
17 Cir. 1989) (holding that injunction requiring a “systematic” screening program and “sufficient” mental
18 health professionals could not support contempt finding). The Final Order unambiguously directs
19 Defendants to refrain from “creating” or “delivering” any check for a customer without performing
20 identity verification of prospective customers and account control verification. (Final Order 4–5.)
21 That other manufacturers create and deliver checks without identity and account control verification
22 has no bearing on whether the Final Order gave Defendants sufficient notice that *they* were prohibited
23 from engaging in such conduct.

24 Nor does the Court agree that holding Defendants in contempt would require the Court to
25 “condemn an entire industry.” (Opp’n to Website Mot. 3.) The Final Order only applies to
26 Defendants; hence, only they are subject to condemnation. Rightfully so, because it was Defendants’
27 product—not the products of third party manufacturers—that produced nearly 155,000 fraudulent
28 checks totaling more than \$402,750,000. *Neovi*, 604 F.3d at 1154.

